DOCKET FILE COPY ORIGINAL

Mark D. Olson Law Offices

410 W. Badillo Street, Second Floor
Covina, California 91723
Telephone: (818) 915-3333 Fax: (818) 331-1111

May 2, 1997

Federal Communications Commission
Office of the Secretary
1919 M Street N.W.
Washington D.C. 20554

To the Secretary of the Commission:

Please kindly file the original and seven (7) copies on the enclosed PETITION FOR RECONSIDERATION, CC Docket No. 95-155, CC Report No. 97-17, which Common Carrier rulemaking was published in the Federal Register on or about April 25, 1997.

Please kindly conform the extra copy and return it to me in the enclosed self-addressed stamped envelope. Thank you.

Very truly yours,

Mark D. Olson

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
RULES PROMOTING	)	
EFFICIENT USE,	)	**REPORT NO. CC 97-17**
FAIR DISTRIBUTION	)	**CC DOCKET NO. 95-155**
OF TOLL FREE NUMBERS	)	
	)	
	)	

PETITION FOR RECONSIDERATION

Mark D. Olson & Associates, Inc. ("MDOA"), by its attorney and executive officer, hereby seeks reconsideration of its recent Report and Order in the above-referenced proceeding. First, MDOA requests the Commission to vacate that portion of its decision that authorizes, mandates or suggests that Carriers and/or Responsible Organizations should disconnect the toll-free numbers and toll-free service of suspected "hoarders" without the benefit of notice, hearing or due process. Second, MDOA requests that the Commission vacate that portion of its rulemaking that creates a "rebuttable presumption" that any toll-free subscriber with "more than one toll-free number" is presumed to be illegally "hoarding" toll-free numbers. Third, MDOA requests that the Commission vacate that portion of its rulemaking that discriminates against toll-free subscribers in the exercise of their rights under the Telecommunications Act of 1996 as "telecommunications end-users", and who are prescribed by Congress to have the right to "retain their telecommunications numbers" with full and unfettered "number portability."

I. THE COMMISSION SHOULD CONSIDER THAT NO CARRIER OR RESPONSIBLE ORGANIZATION MAY DISCONNECT ANY TOLL-FREE NUMBER OR TOLL-FREE SERVICE FOR VIOLATION OF ITS RULES EXCEPT UPON ORDER OF THE COMMISSION IN ACCORDANCE WITH PRINCIPLES OF NOTICE, HEARING AND DUE PROCESS AS PROVIDED BY APPLICABLE LAW.

The Commission's rule seems to suggest or mandate the Carriers and RespOrg's should take it upon themselves to disconnect the toll free numbers and service of their customers suspected of "hoarding," without the customer's right to notice, hearing and due process. Allowing carriers and RespOrgs to disconnect toll-free numbers and service without notice and hearing is arbitrary, capricious and violates principles of due process. It is also an unlawful delegation of Commission authority that will subject toll-free subscribers to wide

spread abuse and selective "enforcement".

Many of the commentators who responded to 95-155 to complain about "abuses" had two things in common: 1) none had been denied access to toll-free service in any manner; 2) they wanted the government to pass a self-serving rule that would assist them in seizing, with the help of their carrier and the Commission, *a particular toll-free number from a particular subscriber, so that the toll free number could be converted to their own profit and use.* This would be under the legal fiction that the larger toll free subscriber possessed a more "legitimate use" than the smaller toll free subscriber. Examples of this self-serving bad attitude are found in 95-155 comments from Avis and Bass Tickets.

Under the present rulemaking, it appears that any carrier and Responsible Organizations can falsely accuse a customer of "hoarding" and disconnect that customer's toll-free numbers and toll free service without notice, hearing or due process. Under this scenario, or any scenario requiring the telecommunications end-user to prove to the Commission their "legitimate use", the customer's rights of "number portability" are absolutely meaningless.

The Commission's rulemaking immediately makes several hundred thousand legitimate toll free subscribers, perhaps as many as 1,000,000 or more toll free subscribers, presumed to be guilty of "hoarding." How will it be enforced? Most likely it will be enforced selectively when large companies have a particular toll free number that they want to extort from a particular toll free subscriber that they feel doesn't have a "legitimate use."

Accordingly, the Commission's rulemaking invites selective enforcement and creates an opportunity for unscrupulous carriers, RespOrgs and high-volume toll free subscribers to coerce smaller toll-free subscribers into surrendering their toll free numbers under the threat of an arbitrary and capricious enforcement action, for which there is only a vague and undefinable standard of "legitimate use" as a defense. This undue burden will cause legitimate toll free subscribers to bear undue expense and time proving their business, marketing and operations plans are "legitimate". This burden far outweighs any legitimate governmental interest, is not in the public interest, and unreasonably and irrationally discriminates against certain classes of "telecommunications end-users" who will not be able to effectively exercise their number portability and number retention rights as prescribed by Congress in the Telecommunications Act of 1996.

II THE COMMISSION SHOULD CONSIDER THAT THE "REBUTTABLE PRESUMPTION" THAT A TOLL-FREE SUBSCRIBER WITH MORE THAT ONE NUMBER IS "HOARDING" IS ARBITRARY AND CAPRICIOUS, THAT THE STANDARD OF "LEGITIMATE USE" IS VOID FOR VAGUENESS

"Legitimate Use" is a vague standard in which there is no way that a subscriber can know in advance what legal conduct is sanctioned and approved by the government so as to be considered "legitimate." Is the standard based upon call volume? Or, is the standard "content based"? To what extent does the Commission provide guidelines as to who has a legitimate use and who doesn't? What is the definable standard to which the law abiding telecommunications end-user can conform?

The Commission appears to recognize the vagueness of its standards when it notes in paragraph 40 of its ruling that: "There is no way of knowing if a subscriber is maintaining an inventory because it may soon have a need for numbers, or if the subscriber is building a supply of numbers for possible sale..."

The legal fiction of "hoarding" and the creation of a "rebuttable presumption" that toll free subscribers with "more than one toll free number" are "hoarders" who are therefore in violation of the Telecommunications Act of 1996 is unreasonable, irrational, arbitrary and capricious for several reasons:

(1) The Commission admits that there is no way to determine "legitimate use" and intent, therefore any standard would be void for vagueness. The Commission's ruling is equally vague in its brief reference as to what factors it may look at in determining "legitimate use." In the brief mention of these factors, the Commission fails to indicate what it is looking for and what identifiable standards will be applied in a uniform manner in order to comply with the rule and substantiate "legitimate use." These arbitrary, capricious, vague and unreasonable standards are in contravention to the Telecommunications Act of 1996 which mandates "number portability" and the right of telecommunications end-users to "retain" their "telecommunications *numbers*" (plural), without having to prove "legitimate use."

In interpreting the plain meaning of the Act of 1996, the Congress did not intend that toll-free subscribers were to be excluded from other "telecommunications end-users," nor did it intend that toll free numbers were to be excluded from the definition of "telecommunications numbers." Accordingly, the concept of "hoarding" is a legal fiction that has no basis of authority or foundation in the Telecommunications Act of 1996. In short, it is designed to defeat the telecommunications end-user's right to full and complete number portability, which includes the customer's right to retain multiple "telecommunications numbers." Therefore, this rule is in clear contravention to the plain meaning of the Act of 1996 and the intent of Congress in enacting portability and number retention rights into law.

(2) The Commission's statement that toll free subscribers with "more than one toll free number" causes toll free numbers to be "unavailable for toll free subscribers that have an immediate need" is a very weak premise on which to claim a "legitimate governmental interest." There is no current shortage of toll free numbers. The creation of new area codes has been an established system for meeting demand. Current plans for expansion of toll free area codes to 877, 866, 855, 844, 833, and 822 assure an additional supply of another 42 million toll free numbers.

In reviewing the 95-115 comments filed with the Commission, it appears that the only complaints regarding "unavailable" toll free numbers came from commentators such as Avis and Bass Tickets. In their comments, they appear to have no complaint that there was a lack of availability of toll free numbers or service. *They simply wanted a way in which they could force a particular toll free subscriber to surrender its toll free number to them.* In light of this, the Commission's rulemaking will now encourage toll free subscribers like Avis, Bass Tickets, and other high-volume telephone subscribers, working with their carriers, to target particular toll free subscribers who hold a particular toll free numbers that they want so that they can seize it and convert it to their own use and profit. We believe that this in not in the "public interest," there is no legitimate governmental interest in sanctioning this, and that it

is clearly in violation of the rights and protections afforded to all "telecommunications end-users" under the Act of 1996. In direct opposition to the intent of the Act of 1996, the current rulemaking opens the door for telecommunications end-users to be subjected to an arbitrary and capricious de facto "comparative hearing", in which the outcome will be determined by the vague principles of "legitimate use."

III. THE COMMISSION SHOULD PROTECT THE STATUS OF EXISTING TOLL FREE SUBSCRIBERS AS "TELECOMMUNICATIONS SUBSCRIBERS" ENTITLED TO THE NUMBER PORTABILITY AND THE RIGHT TO RETAIN MULTIPLE "TELECOMMUNICATIONS NUMBERS" IN ACCORDANCE WITH THE TELECOMMUNICATIONS ACT OF 1996. THE COMMISSION SHOULD FIND THAT THE PRESENT RULE REPRESENTS AN ARBITRARY, UNREASONABLE AND CAPRICIOUS CLASSIFICATION OF TELECOMMUNICATIONS SUBSCRIBERS THAT IS WITHOUT A RATIONAL BASIS OR LEGITIMATE GOVERNMENTAL INTEREST.

The Commission's rulemaking lacks a "rational basis" or "legitimate governmental interest" for identifying toll free subscribers as a class of "telecommunications end-users" that should be denied the number portability and retention rights mandated by Congress in the Telecommunications Act of 1996. Accordingly, we submit the following points::

(1) The rulemaking presumes that hundreds of thousands, perhaps as many as 1,000,000 or more, legitimate toll-free subscribers who employ "more than one toll free number" are violating the Telecommunications Act. The threat of the rule's presumption of guilt, in addition to the arbitrary and capricious standards and severe penalties, will have a "chilling effect" on the development and expansion of new telecommunications services and uses, which the Act of 1996 was intended to encourage.

(2) The Commission's ruling creates an irrational and unreasonable class of hundreds of thousands of legitimate toll free subscribers (perhaps as many as 1,000,000 or more) who are "rebuttably presumed" to be in violation of FCC rules and answerable to the Commission in a forfeiture action for simply employing "more than one toll free number." This unreasonable classification of possible violators is irrational and invites arbitrary and capricious selective enforcement. It creates an unreasonable burden for telecommunications end-users that violates the Act of 1996, and to which there can be no rational person would see a "legitimate governmental interest" or "compelling state interest" that outweighs the potential undue burden that could be imposed upon so many telecommunications end-users. The market instability created by making such a large number of legitimate telecommunications users subject to a potential forfeiture hearing and loss of their entire business is anti-competitive, unduly burdensome, and is not in the legitimate public interest. In fact, it is only in the interest of a selected group of carriers who call themselves "the Industry," and who would like to see "number portability"restrained for anti-competitive reasons that go far beyond mere pricing issues.

(3) The term "immediate use" is also vague, and creates another unreasonable and irrational classification of telecommunications end-users who will be denied the "number portability" and number "retention" rights that have been mandated by Congress. Many legitimate businesses and organization hold "more than one number" for purposes of business expansion and development. To classify that these bill paying subscribers are not entitled to the same protection afforded "all telecommunications subscribers" under the 1996 Act is also unreasonable, arbitrary and capricious. Such a classification scheme particularly discriminates against toll free subscribers who are starting new telecommunications service ventures, and it is clearly anti-competitive and violates the legislative mandate of the Commission to forbear from regulating new classes of telecommunications services unless clearly necessary to the public interest. The mere fact that toll free subscribers will be subjected to explaining and justifying their "legitimate use" business plans with the Commission has a very chilling effect on the development of new telecommunications services that the 1996 Act was intended to achieve.

(4) In addition, classifying any toll free subscribers as being in a different class than the "telecommunications end-user" intended by Congress is unreasonable and irrational, and without authority under Telecommunications Act of 1996. The Act of 1996 creates important rights of "number portability" and number "retention" for all telecommunications end-users. As previous cited, these rights have been acknowledged by the Commission in Report No. 96-286, which states in part that "the 1996 Act mandates that end-users be able to 'retain...existing telecommunications numbers...when switching from one telecommunications carrier to another.' Requiring any number change would contravene this basic requirement. Congress noted that the ability to switch service providers is only meaningful if customers can retain their telephone numbers." (Report No. 96-286).

Furthermore, the Congress did not intend to create a separate classification for the treatment of toll-free numbers and and subscribers. All telecommunications subscribers and end-users are mandated, without discrimination, to have an unfettered right to number portability, which includes the inherent right of the customer retain its multiple telecommunications numbers, including toll free numbers, to the extent it is technically feasible. In the case of toll free numbers, it has been technically feasible since May 1993. The Congress, in codifying telephone number portability and retention rights into law, made no mention of requiring certain classes of telecommunications subscribers to prove or certify their "legitimate use" before they could benefit from the protections of the Telecommunications Act 0f 1996.

DISCUSSION

The intent of the Telecommunications Act of 1996 is to promote competition, which included the recognition of the rights of all telecommunications end-users, whether employ geographic or toll-free non-geographic numbers. The Act clearly states that subscribers must be able to "retain...existing telecommunications numbers." Telecommunications "numbers"

is clearly expressed in the plural, which by the plain meaning of the statute means that telecommunications end-users are entitled to the protection and retention of "more than one number."

The Commission has not clearly stated why there is a "legitimate governmental interest" for mandating that toll free subscribers now be given differential treatment as a class of telecommunications users who are not entitled to the rights Congress intended for all telecommunications subscribers. In weighing the burdens created by the rule with the government's interest, there is no "rational basis" for making the rights of toll free subscribers different that the rights of other telecommunications end-users, such as those enjoyed by geographic POTS number subscribers.

We agree that the entire numbering system and U.S. telephone network is a "public resource" that should be regulated by the Commission. However, the public resource of geographic POTS numbers is being exhausted at a phenomenal rate, causing area code splits virtually every month. This "harm" results in great expense to network carriers, as well as forcing millions of customers to change their advertising, marketing and letterhead at great expense to the public. As a matter of statistical fact, it could be conclusively argued that this phenomena is brought about by telecommunications subscribers who have "more than one number", many of which are unused and held for future use.

The Commission appears to discriminate against telecommunications end-users with more than one toll free number, while taking no action against telecommunications users who cause the rapid exhaustion of geographic area codes by subscribing to more than one geographic number. In the case of geographic area code splits, there is enormous expense to the telephone infrastructure and major inconvenience to a large segment of the population who must change their area codes. Nonetheless, the Congress intends the public to be afforded full protection of all geographic telephone numbers that identify them for the designated region. The only reasonable and rational solution is to create new area codes.

There is no known case of a telephone subscriber being unable to obtain a geographic telephone service because of the large number of telecommunications end-users who "hoard" geographic POTS numbers. We believe that this is also a matter of fact with respect to toll free numbers. There is no rational basis or actual case in fact where a toll free subscriber has ever been unable to obtain toll free numbers or service.

The 95-155 commentators who cried for relief from "800 pirate", "hoarders", and "unscrupulous number brokers" had never experienced being unable to obtain toll free service or a toll free number. Their real complaint was *that they could not obtain the particular toll free number that they wanted from a particular toll free subscriber who refused to release it.* In short, the implementation of the rule with its vague standards now opens the door for widespread abuses by unscrupulous subscribers, who, conspiring with their Carriers and RespOrgs, will target particular toll free subscribers in an attempt to extort them to release, assign or surrender their toll free numbers. This will be particularly true when a large, high-volume customers decide they want a particular toll-free number that belongs to a telecommunications end-user with low calling volume. Under the "legitimate use" standard, how will the Commission decide who is more important? Is the rental car or rock concert ticket distributor who does $50,000 per month in call volume more important and

"legitimate" than the Rape Crisis or Suicide Prevention Hotline that does only $500 per month? How about a toll free subscriber that expounds an unpopular political opinion with its toll free number? What standard will apply and who will be considered to be found to be "legitimate" subscriber who is worthy of toll free telecommunications services?

We believe that even having to think about defending oneself from the potential abuses of this draconian rule is chilling, anti-competitive, and violates the clear Congressional mandate in favor of all "telecommunications end-users" to retain their current "telecommunications numbers." Multiple number retention rights are integrally tied to the statutory mandate of "number portability." Therefore, we assert that the Commission is without Congressional authority to begin classifying "telecommunications end-users" into "legitimate" and "non-legitimate" categories who are subject to arbitrary and capricious enforcement standards.

It is clear that the Congress did not mean to exclude toll free subscribers from the plain meaning of the Act of 1996, which clearly defines protections of "number portability" and multiple number retention by the end-user. The Congress did not intend that telecommunications users with "more than one (telecommunications) number" should be presumed to be in violation of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Congress also did not intend that telephone subscribers must prove that they have a "legitimate use" or high call volume in order to gain or maintain access to the telephone network.

The Commission itself acknowledges that the principals of unfettered "number portability" as mandated by the Act of 1996 should apply to all telecommunications subscribers when it states in CC Docket No. 95-116, paragraph 3, that "In the United States, 1-800 numbers are the best example of portable telephone numbers." This acknowledgment, and the plain meaning of the Act of 1996, should make it clear that "toll free numbers" are an equal part of the same telecommunications regulatory scheme in which all "telecommunications end-users" have undeniable rights to "number portability" and retention of their multiple "telecommunications numbers." When the Commission states it has a "legitimate interest" in regulating toll free numbers, it states that "Hoarding can also result in some customers being able to obtain toll free numbers, even though certain numbers aren't being used"; and 2) "It is time consuming and costly for the industry to perform the necessary modifications to the network so it can support [new toll free area codes]." The Commission does not any legitimate reason or rational basis as towhy this harm is any different than the harm that caused by geographic POTS telephone subscribers with "more than one number", and why creating new area codes to meet the demand of geographic subscribers is an acceptable practice for the orderly allocation of number resource, but the creation of new toll free area codes is such too great of a burden. It is with this faulty reasonin that the Commission appears to claim a "legitimate governmental interest" in classifying and excluding toll free subscribers from the "number portability" and inherent "number retention" rights mandated by Congress to all "telecommunications end-users." There is no "rational basis" or "legitimate governmental interest" for this differential treatment of telecommunications end-users and subscribers.

As the Commission states in CC Docket No. 95-116, "the inability of end-users to

retain their telephone numbers...that is, the lack of number 'portability' --appears to deter customers who wish to select new and different services or who wish to choose among competing service providers. Changing telephone numbers can be more than inconvenient. Businesses that change telephone numbers, for example, incur administrative and marketing costs. These costs, *and the potential loss of customers,* may inhibit businesses from selecting new services or providers. Full number portability would permit customers to change service providers. Full number portability would permit customers to change service providers, services, and even geographic locations without having to change their *telephone numbers.*" (Italics added for emphasis)

As previously stated, the Commission has acknowledged that "the 1996 Act mandates that end-users be able to 'retain...existing telecommunications numbers...when switching from one telecommunications carrier to another.' Requiring any number change would contravene this basis requirement. Congress noted that the ability to switch service providers is only meaningful if customers can retain their telephone numbers." (Report No. 96-286). The Congress did not create a separate classification for treatment of toll-free numbers and regular geographic numbers. The intent of the 1996 Act is to promote competition by recognizing the right of end-users, whether geographic or toll-free non-geographic numbers, or any other type of telecommunications number, to "retain...existing telecommunications numbers."

The plain meaning of "telecommunications numbers" includes toll-free numbers and anticipated that it is in the "public interest" to protect end-user rights to more than one number. The plain meaning of the act also recognizes that "number portability", which is the right to switch service providers, can only be "meaningful" if the customer can "retain their telephone *numbers.*"

Therefore, the Congress did not intend that toll-free numbers and service be treated differently than geographic based POTS numbers. The Commission's creation of a separate classification of treatment is without a "rational basis" or "legitimate government interest."

As intended by Congress, number portability and the right to switch carriers are meaningless unless the customer has the "right to retain...telecommunications numbers." The plain meaning of the act allows customers to have multiple telephone "numbers." There is no rational basis or statutory authorization for excluding toll-free subscribers as a member of that protected class of telecommunications subscribers.

In addition there is no compelling state interest for the Commission a compelling state to differentiate the treatment of toll-free subscribers with more than one number from geographic POTS subscribers with more than one number. Both classes of subscribers cause numbers to be exhausted which result in additional expense creating new area codes. In fact, arguably, an area code split with the resultant change in telephone numbers for customers has a more burdensome effect on the public than the creation of new toll free area codes. Yet, the Commission chooses to single out toll-free subscribers as a class, without a rational basis or compelling governmental interest..

In conclusion, the Commission's ruling on the "Fair Allocation of Toll Free Numbers" is serious flawed in that it violates the rights of telecommunications users as prescribed by the Telecommunications Act of 1996, it is in contradiction to the Commission's policies and statements regarding implementation of the Act to promote competition and provide

customer rights for number portability. The rule is also flawed because it creates an unreasonable class of telecommunications users who receive negative differential treatment, it lacks due process by suggesting that carriers and RespOrgs should disconnect access to service without notice or hearing, and the standard of "legitimate use" is void for vagueness, as the Commission even admits that it is not possible to determine a subscriber's intention.

MDOA has considerable expansion plans and uses for its toll free 800 numbers. Almost all of our 800 numbers have been in continuous use since 1993, with many 800 numbers in continuous use since 1986. The loss of any MDOA 800 number would result in a substantial loss to MDOA, and MDOA affiliates and subsidiary companies that use the 800 numbers for advertising, marketing, public relations, information hotlines, and client communications. We believe that the Commission has departed from its standards regarding "number portability", as well as its standards for a good-faith implementation of the Telecommunications Act of 1996. To that degree, and for the reasons set forth in this Petition for Reconsideration, the rulemaking regarding "fair" allocation of toll free numbers violates the Act of 1996, is arbitrary and capricious, and constitutes an abuse of discretion which will directly affect the rights and privileges to which MDOA would otherwise be entitled as a "telecommunications end-user" and toll free subscriber.

WHEREFORE, it is respectfully requested that this Petition be granted.

Respectfully submitted,

MARK D. OLSON & ASSOCIATES INC.

DATED: May 2, 1997

By: _____

Mark D. Olson
Its Attorney & Executive Officer